P. C.
1908
February 11,
April 2.

PRIVY COUNCIL.

DALIP SINGH AND OTHERS (DEFENDANTS) *v.* NAWAL KUNWAR AND ANOTHER (PLAINTIFFS.)

[On appeal from the High Court of Judicature, North-Western Provinces, Allahabad.]

Privy Council, Practice of—Courts in India differing as to question of fact—Question as to a mortgage being a real or fictitious transaction—Circumstances to be taken into consideration in dealing with conflicting evidence.

On the question whether a mortgage was a fictitious or a real transaction, there was evidence on each side bearing directly on the character of the transaction, but on neither side was the evidence wholly convincing. Persons whom one might have expected to be prominent witnesses were not called, and the evidence given by those who were called was open to much adverse criticism. The Courts in India differed, the Subordinate Judge deciding that the mortgage was fictitious, and the High Court holding it to be a genuine transaction. *Held* by the Judicial Committee that in determining which story was to be accepted it was necessary for their Lordships to rely largely upon surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions; and their subsequent conduct: and so dealing with the case their Lordships upheld the decision of the High Court.

The fact that if a genuine transaction it was advantageous to th mortgagor, and if fictitious it afforded him no immediate protection from creditors (which was the motive alleged by the defendants for entering into the transaction) was a very material circumstance in the case.

APPEAL from a judgment and decree (17th November 1902) of the High Court at Allahabad which reversed a judgment and decree (23rd December 1899) of the Court of the Subordinate Judge of Meerut.

The principal question involved in this appeal was whether a deed of mortgage executed on the 10th January 1889 was a genuine or fictitious transaction.

Partab Singh, who was the owner of certain land and houses at Meerut, had two sons, Bakhtawar Singh and Risal Singh, the latter of whom was a minor at the time of the transactions which gave rise to the litigation out of which the appeal arose. On 23rd August 1884 Partab Singh executed a promissory note for Rs. 300 in favour of Kishan Sahai Sahu. On the 14th July 1885 he executed a mortgage for Rs. 3,000 of a share in land and one-half

Present:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE and Sir ARTHUR WILSON.

of a house in favour of Shibban Lal; and on 6th January 1886 in consideration of an advance of Rs. 1,300 from Munna Lal, he mortgaged to him the one house and one-half of another house. During 1886, 1887 and 1888 Partab Singh borrowed further sums of money from Munna Lal.

On 10th January 1889 Partab Singh executed the mortgage now in dispute in favour of Chaudhrain Nawal Kunwar. It was also executed by Bakhtawar Singh for himself, and by Partab Singh as guardian of his minor son Risal Singh. The consideration was made up as follows:—For payment to Munna Lal Rs. 3,250; for payment to Bhawani Prasad and Banarsi Das, heirs of Shibban Lal, Rs. 4,528; for payment to Kishan Sahai Rs. 515; due to Nawal Kunwar on a bond dated 14th March 1888, Rs. 549; expenses in connection with the execution of the deed Rs. 158; and in cash Rs. 1,000; making in all Rs. 10,000. The mortgagee, Nawal Kunwar, undertook to discharge the debts above-mentioned; and not being at the time in possession of a large sum in cash, she on 10th January 1889, borrowed Rs. 5,000 from Munna Lal, who on making the advance paid her only the sum of Rs. 1,750 in cash and applied the balance to the discharge of his debt. In pursuance of her agreement, Nawal Kunwar paid off Kishan Sahai, and also paid Rs. 2,865-9-0 to the heirs of Shibban Lal, she did not pay the balance, as Partab Singh, in violation of his covenant, did not deliver to her possession of the property mortgaged.

On 18th July 1896, Partab Singh having died, his sons Bakhtawar Singh and Risal Singh sold the property mortgaged to Munna Lal for the sum of Rs. 25,750; out of the consideration the vendee retained the sum of Rs. 10,000 for payment of Nawal Kunwar's mortgage of 10th January 1889, and the deed recited that the debt due to her had been discharged by payment.

On 18th January 1898 Jainti Prasad, the son of Munna Lal then deceased sold a small portion of the property to one Dalip Singh; and after giving notices to Banarsi Das who represented Shibban Lal, and to Jainti Prasad as representing Munna Lal, Nawal Kunwar instituted on 24th September 1898 the present suit, to recover the sum of Rs. 8,337-9-0 with interest by sale of the mortgaged property. That sum was arrived at by deducting

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from Rs. 10,000 the amount not paid to Shibban Lal. The defendants to the suit were Bakhtawar Singh and Risal Singh heirs of Partab Singh; Jainti Prasad and Shiam Sundar heirs of Munna Lal; Banarsi Das heir of Shibban Lal, and Dalip Singh purchaser from Jainti Prasad.

Dalip Singh did not appear. The sons of Partab Singh filed a written statement asserting that only Rs. 1,000 of the consideration money had been paid, and that the debt was contracted for immoral purposes. The heirs of Munna Lal alleged that the mortgage in suit was fictitious and executed to save Partab Singh's property; while Banarsi Das pleaded that the whole amount due on Shibban Lal's mortgage had not been paid.

The Subordinate Judge held that the debt was not incurred for immoral purposes; but that the plaintiff did not pay the consideration of the mortgage bond "which was therefore a nominal and fictitious deed executed by Partab in favour of Nawal Kunwar to serve some purpose." Without deciding any other issue he made a decree dismissing the suit with costs.

On appeal the High Court (SIR J. STANLEY, KT., C.J., and P. C. BANERJI, J.) reversed the finding of the Subordinate Judge that the mortgage was fictitious, and decided that Nawal Kunwar had advanced the sum of Rs. 8,322-9-0. A decree was accordingly made directing an account of the money actually due to Nawal Kunwar after making due allowance for the mortgage debt due to Munna Lal and Shibban Lal on the mortgages dated respectively 10th January 1889 and 14th July 1885, and directing a sale of the mortgaged property for realization of the amount found due on the taking of the said account.

The portion of the judgment of the High Court setting forth the grounds on which the Subordinate Judge relied in support of his decision that the mortgage was fictitious, and stating the reasons why the High Court thought it genuine, was as follows:—

"The principal question to be determined in the appeal is whether the mortgage in favour of the plaintiff was a fictitious transaction. We have carefully considered the terms of the mortgage-deed. The various provisions contained in it are not such as one would expect to find in a document executed fictitiously for the protection of property, on the contrary they offered clear indications of the genuineness of the transaction. The bond sets forth in detail, and correctly, as the evidence shows, the liabilities of the mortgagors

at the date of the mortgage and provides that those liabilities should be discharged by the mortgagee. It further provides that she should take possession of the mortgaged property from the beginning of the *rabi* crop of 1296 *Fasli* and appropriate the usufruct for the realization of the mortgage money and interest. Then follow detailed provisions as to the mode in which possession is to be delivered and it is provided that in the event of the mortgagors' failure to deliver complete possession or to get mutation of names effected the mortgagee would be entitled to charge compound interest, not at the rate originally agreed upon but at the enhanced rate of Rs. 24 per cent. per annum. There are other provisions in the deed which are only consistent with its being a genuine document. The motive alleged for entering into a fictitious transaction is, as already stated, the protection of property from the claims of creditors. We fail to see how that object could be attained by executing a mortgage. It is not shown that besides the debts specified in the mortgage-deed there were any other debts amounting to large sums due by the mortgagors. The value of the property was sufficiently large to cover other liabilities subsequently incurred. The defendants themselves have purchased it for a sum exceeding Rs. 25,000, so that by the execution of a mortgage-deed it was hardly probable that the mortgagors could protect their property. The circumstance upon which the lower court chiefly relies for holding that the mortgage was a fictitious transaction is the fact that on the date of the mortgage in question the mortgagee executed a sub-mortgage of the same property for Rs. 5,000 in favour of Munna Lal, the father of the defendants Nos. 3 and 4. It is provided in the plaintiff's mortgage-deed that the mortgagors should before making any payments to the plaintiffs pay over to Munna Lal all sums due upon his sub-mortgage, and from this provision it is inferred that the present mortgage was in reality a mortgage in favour of Munna Lal and that the name of the plaintiffs was only used fictitiously by Partab Singh. It appears that Munna Lal held a prior mortgage in respect of the property mortgaged to the plaintiff and that a sum of Rs. 3,250 was due to him on that mortgage. It seems that the plaintiff had not sufficient funds in her hands to be able to pay the full amount of the mortgage in her favour. Therefore, simultaneously with the execution of the mortgage-deed in her favour, she executed a sub-mortgage in favour of Munna Lal, for Rs. 5,000, out of which it was agreed that the aforesaid sum of Rs. 3,250 should be set off and the balance of Rs. 1,750, should be paid over to the plaintiff. There is no question that this sum of Rs. 1,750, was actually received by the plaintiff. The mere fact that on the day on which the mortgage in plaintiff's favour was made she executed a sub-mortgage of the property does not in our opinion raise any presumption that the said mortgage was not a genuine transaction. A sub-mortgagee would take every precaution to see that the money advanced by him is properly secured and would require such conditions to be inserted in both the deeds executed on the same date as would preclude the original mortgagor from resisting any claim which the sub-mortgagee might have to bring afterwards and also prevent his mortgagor, that is the original mortgagee, from appropriating the payments made by her mortgagor

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and leaving the sub-mortgage unsatisfied. It is only provisions of that character which we find inserted both in the plaintiff's mortgage-deed and in the deed of sub-mortgage executed in favour of Munna Lal. The provisions upon which the learned Subordinate Judge relies as indicating that the transaction was of a fictitious character so far from showing that the transaction was of that nature raise in our opinion the inference that the mortgage was a genuine mortgage.

"The next circumstance upon which the learned Subordinate Judge places considerable reliance is the delivery of a currency note for Rs. 1,000 to Bhawani Prasad in payment of a part of the money due upon the mortgage-deed held by Shibban Lal, to which reference has been made above. It appears that Rs. 1,000 was paid as a part of the consideration for the mortgage in the plaintiff's favour in the presence of the registering officer by the delivery of a currency note of that amount to the mortgagors. On the day following that of the mortgage the mortgagee paid to Bhawani Prasad Rs. 1,500 on account of Shibban Lal's mortgage. The same currency note which had been delivered to the mortgagors the previous day appears to have been made over to Bhawani Prasad. From this circumstance it is contended that no actual payment of consideration in respect of the mortgage in question was made by the plaintiff and that the currency note which was shown to the Registrar as a part of the consideration was taken back from the mortgagors and made over to one of their creditors. The explanation given on behalf of the plaintiff is that on the day subsequent to that of the registration of the mortgage-deed the mortgagor, Partab Singh, wanted to have the currency note for Rs. 1,000 which he had received the previous day converted into cash; that the plaintiff gave him cash in lieu of the currency note, took it back from him and made it over to Bhawani Prasad in payment of his mortgage. The oral evidence which has been adduced in support of the plaintiff's allegation is not very satisfactory, but it seems to us to be in the highest degree unlikely that if Partab Singh, who was evidently a man of affairs, was executing a ficititious document, he would do an act on the day following that of the execution of the mortgage-deed which would nullify the effect of the document and afford evidence which might be used to show the real nature of the transaction. Why would he cause the number of the currency note which was mentioned in the Registrar's endorsement to be specified in the receipt granted by Bhawani Prasad? It seems to us that the plaintiff's explanation in respect of the currency note for Rs. 1,000 is much more probable than the suggestion on behalf of the defendants. If the transaction was a genuine one, as we believe it to have been, it is not unnatural that Partab Singh, instead of incurring the expense of cashing the currency note by payment of discount, made it over to the plaintiff and received from her the money which she was about to pay to one of the creditors. The plaintiff's allegation on the point is supported to a considerable extent by the evidence of Inayat Ali, a witness for the defendants, through whom payment was made to the prior mortgagees. The learned advocate for the respondent has relied upon two other circumstances as indicating that the transaction was fictitious. The

first circumstance is that the mortgagor did not deliver possession to the plaintiff in accordance with the terms of her mortgage, and that the plaintiff took no steps to obtain possession. The second circumstance to which he refers is that, while in the plaintiff's mortgage-deed the rate of interest provided is 13 annas per cent. per mensem, the interest which she agreed to pay to Munna Lal in respect of the sub-mortgage executed by her was 14 annas per cent. per mensem. A sufficient answer is afforded to both these contentions by the clause in the mortgage-deed of the plaintiff referred to above, which is to the effect that in the event of possession not being delivered, the plaintiff was to get enhanced interest at the rate of 24 per cent. per annum. We have further the fact that for a long period after the execution of the mortgage-deed in the plaintiff's favour, Partab Singh admitted the plaintiff to be a mortgagee from him and treated the transaction as a genuine transaction. The recitals contained in the sale-deed executed by the first two defendants in favour of the defendants 3 and 4 raise a similar inference and show that there was a genuine mortgage in the plaintiff's favour. A third circumstance which seems to us to tell very much in favour of the plaintiff is the fact that the plaintiff was in possession of the documents which were taken back from the creditors of the mortgagors. There is nothing to show that at the time of the institution of the suit there was any collusion between her and the mortgagor defendants. On the contrary, the conduct of Risal Singh, defendant, fully negatives the existence of any such collusion. For the above reasons we are of opinion that the conclusion at which the learned Subordinate Judge arrived as to the nature of the transaction is not warranted by the evidence, and that the mortgage in the plaintiff's favour was a genuine mortgage."

The appellants to His Majesty in Council were Jainti Prasad and Shiam Sundar, the former of whom died pending the application to appeal and his sons Dalip Singh and Tara Chand were substituted on the record as his representatives. On the application of the appellants Muktar Singh, as purchaser of the decree made in favour of Nawal Kunwar, was added as a respondent to the appeal. On this appeal.

Jardine, K. C., and *Ross* for the appellants contended that the Subordinate Judge was right in holding that the mortgage in suit was a fictitious or *benami* transaction. The theory of the High Court as to the mode of payment of the consideration was based on mere probabilities. The High Court admitted that the oral evidence for the respondent was not satisfactory, and that Court should have gone further and have taken into consideration the important fact that the respondent had not tendered her own evidence in support of her case. Nor did the High Court consider other important features in the case, namely, the position in

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which the respondent stood towards Partab Singh, and the fact that the mutation proceedings were fictitious.

De Gruyther, K. C., and *Cowell* for the respondent contended, mainly for the reasons given in the judgment of the High Court, that the mortgage represented a genuine transaction which was valid, and binding on the appellants. The decree of the High Court, by which the claims of all parties to the property in dispute had been justly settled, should therefore be upheld.

Jardine, K. C., replied.

1908, *April 2nd*:—The judgment of their Lordships was delivered by SIR ARTHUR WILSON:—

This is an appeal from a judgment and decree of the High Court at Allahabad, bearing date the 17th November 1902, which reversed those of the Subordinate Judge of Meerut, dated the 23rd December 1899. The substantial question as to which the Courts in India have differed, and which their Lordships have to decide, is whether a certain deed of mortgage, bearing date the 10th January 1889, represents a genuine transaction or a fictitious one.

The mortgagors were one Chaudhri Partab Singh and his two sons, one of whom was then a minor. The subject-matter of the mortgage was land and houses at Meerut. At the time of the mortgage Partab was indebted to several persons, partly on mortgages and partly on other securities, the principal creditors being one Munna Lal, the heirs of one Shibban Lal, and one Kishan Sahai, and it is clear that at that time Partab was in money difficulties.

The mortgage in controversy purports to be in favour of a lady named Nawal Kunwar, for Rs. 10,000. Nawal Kunwar was at that time residing in Partab's house, and she was the sister of his son-in-law.

The transaction of the 10th January 1889, as it appears on the face of the papers, consisted of two parts. First, there was the mortgage now disputed, executed by Partab and his two sons in favour of Nawal Kunwar, according to which the lady, as consideration for the mortgage, was to discharge Partab's debts already referred to, a small previous bond in her own favour, and the costs of the transaction, and to pay over Rs. 1,000 to Partab.

The second part of the transaction purports to be a sub-mortgage by the lady to Munna Lal, who has been already mentioned as a creditor of Partab. It was for Rs. 5,000, out of which Munna Lal was to deduct the amount of his previous claim against Partab, and to pay the balance in cash.

Subsequently, on the 18th July 1896, Partab being dead, his sons sold the mortgaged property to Jainti Prasad, the son of Munna Lal, who was also dead, and on the 18th January 1898, Jainti Prasad sold a portion of the property to one Dalip Singh.

On the 24th September 1898 Nawal Kunwar instituted the present suit in the Court of the Subordinate Judge of Meerut. She joined as defendants, 1 and 2, the sons of Partab, 3 and 4, the sons of Munna Lal, 5, the heir of Shibban Lal and 6, Dalip, the purchaser of a portion already mentioned. The object of the suit was to enforce payment of the plaintiff's claim under her mortgage of the 10th January 1889, by the sale of the mortgaged property. It is clear, therefore, that the parties substantially interested in the contest were, on the one hand, Nawal Kunwar, and on the other hand, the sons and heirs of Munna Lal, and, in a lesser degree, Dalip.

The plaintiff's case at the trial was that the mortgage to her was a perfectly genuine mortgage, and that she paid the greater part of the consideration (the precise amount is immaterial here) partly out of her own moneys and partly by means of the Rs. 5,000 borrowed by her from Munna Lal under the sub-mortgage of the same date. The case on the other side was that the mortgage to Nawal Kunwar was a fictitious transaction, and that the only real transaction on that occasion was a borrowing by Partab of Rs. 5,000 from Munna Lal, the name of the lady being introduced purely *benami*.

The Subordinate Judge found for the defendants, holding the alleged mortgage to her to be *benami*. On appeal the High Court differed from that finding; held the transaction to have been genuine, and gave a decree in the plaintiff's favour.

Their Lordships are of opinion that the decision of the High Court was right. There was some evidence on each side, bearing directly on the character of the transaction, but on

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neither side was that evidence wholly convincing. Persons whom one might have expected to be prominent witnesses were not called, and the evidence that was called is open to much adverse criticism. The testimony of one witness is described by the Judge who heard it as being worthless. In determining, therefore, which story is to be accepted, it has been found necessary in India, and it is equally necessary for their Lordships, to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions, and their subsequent conduct.

As their Lordships agree in the conclusion arrived at by the High Court, and substantially in the reasons for that conclusion, it is unnecessary to examine the evidence in detail, but it may be well briefly to indicate the principal considerations which seem to their Lordships to support the case of the plaintiff.

The deed itself contains nothing suspicious. Its recitals show with substantial accuracy Partab's previous indebtedness, and the provisions of the deed are such as one expects to find in a deed embodying a real transaction.

The plaintiff, though a woman residing in Partab's house, was not, in the ordinary sense of the term, a dependent member of his family. She was a person of some independent means, was in the habit of lending money, and lent it to Partab himself not on this occasion only. On the other hand, Partab was in embarrassed circumstances. Only five days after the mortgage in question, he was pressed for payment of Government revenue, and had to borrow Rs. 300 from the plaintiff to pay it. Partab's motive in the disputed transaction must have been to relieve his difficulties, but if regarded as a *benami* tranasction, the mortgage, which was for considerably less than the value of the property would have afforded no present protection against creditors. It was suggested that by the accumulation of interest, at a penal rate, the deed might in time become a protection, but that is a somewhat remote speculation. If regarded as a genuine transaction, the advantages to Partab of what was done are obvious. He secured a diminution in the rate of interest which he had to pay, he obtained the benefit of one consolidated liability in place of a number, and he secured a friendly creditor.

At subsequent dates, Partab and his sons, and those claiming through them, always acknowledged the genuineness of the transaction. Particularly in the conveyance by Partab's sons to Jainti Prasad the mortgage is so recognised. It is true that in that deed it is said that the mortgage had been satisfied, but that is a very different thing from there having been no mortgage at all.

One point of minor importance was raised on the appeal. The High Court, by their decree, whilst giving the plaintiff the right to recover on her mortgage, allowed as against her whatever amount not exceeding Rs. 10,000 might be due under the sub-mortgage to Munna Lal. It was contended that the limitation to Rs. 10,000 was wrong. Their Lordships are of opinion that the limitation was right. That sum was agreed upon on the occasion of the sale by Partab's heirs to Jainti Prasad, and the matter was dealt with on that footing by the substantial defendants in their written statement.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs.

Appeal dismissed.

Solicitors for he appellants—*T. L. Wilson & Co.*

Solicitors for the respondents—*Ranken, Ford, Ford & Chester.*

J. V. W.